Dhaya Maju LTAT Sdn Bhd v Kerajaan Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-21C-7–09 OF 2020
ALIZA SULAIMAN J
26 OCTOBER 2020

Civil Procedure — Injunction — Ad interim injunction — Application for — Plaintiff sought to restrain and prevent defendants from cancelling or terminating contract and from acting or taking steps to cancel or terminate contract — Whether s 29 of Government Proceedings Act 1956 prohibited grant of ad interim injunction against defendants — Government Proceedings Act 1956 s 29

By an ex parte notice of application ('encl 3'), the plaintiff sought an order to restrain and prevent the defendants from taking certain actions pursuant to O 29 of the Rules of Court 2012 and/or under the inherent jurisdiction of the court pending the disposal of the civil suit vide writ of summons and statement of claim, which were filed at the same time as encl 3. The plaintiff was awarded a project ('the project') by way of a 'surat setuju terima' ('the first SST'). However, the Secretary General of the Ministry of Transport ('MOT') sent a notice terminating the first SST on the grounds of public interest, national security and national interest. The plaintiff contested the termination of the first SST. Subsequently, several meetings and/or discussions were held between the parties. These culminated in a settlement agreement being executed between the plaintiff and the first defendant ('D1') where D1 reappointed the plaintiff to implement the project. D1 issued a new SST to the plaintiff ('the second SST'). After signing and returning the contract documents to the MOT, the plaintiff sought the second defendant's ('D2') approval for the contract documents to be signed in the immediate future. However, vide a media release, D2 announced the decision of the Cabinet that continuing with the implementation of the project based on direct negotiation was untenable and the contract would be reopened for tender. Regarding the application in encl 3, it was averred that the defendants were in the process of reopening the bidding process for the project via an open tender system and would terminate or cancel the contract with the plaintiff. Hence, an interim injunctive relief was said to be necessary. The issue for determination was whether s 29 of the Government Proceedings Act 1956 ('GPA 1956') prohibited the grant of an ad interim injunction against the defendants.

Held, dismissing the application with costs of RM10,000:

(1) As 'highly controversial' as the case of *Government of Malaysia v Lim Kit Siang and United Engineers (M) Bhd v Lim Kit Siang* [1988] 2 MLJ 12 ('UEM's case') may be due to the 'vigorous dissenting judgments', there

was no other decision by the highest court of this country which had given a different interpretation to s 29 of the GPA 1956 than that in UEM's case. Besides, with the firm pronouncement in *Tan Bun Teet & Ors v Menteri Sains, Teknologi dan Inovasi Malaysia & Ors* [2013] 3 MLJ 676, being a later decision of the Court of Appeal, that an injunction, whether interim, interlocutory or permanent could not be granted against the government under s 29 of the GPA 1956 and s 54 of the Specific Relief Act 1950, this court was bound by the doctrine of stare decisis to similarly hold that an injunction could not lie against the government or its officers (see para 46).

(2) The plaintiff's suit against D2 was, in substance, in his official capacity as the Minister of Transport and a member of the Cabinet. Therefore, an ad interim injunction did not lie against D2. To allow an ad interim injunction to be granted against D2 to restrain and prevent him from cancelling or terminating the second SST, and from acting or taking any steps in connection with any cancellation or termination of the second SST would, in effect, restrain and prevent the government from cancelling or terminating the second SST. This would contravene s 29(2) of the GPA 1956 (see paras 49–50).

[Bahasa Malaysia summary

Melalui notis permohonan ex parte ('lampiran 3'), plaintif memohon perintah untuk menyekat dan menghalang defendan daripada mengambil tindakan tertentu menurut A 29 Kaedah-Kaedah Mahkamah 2012 dan/atau di bawah bidang kuasa sedia ada mahkamah sementara menunggu penyelesaian saman sivil melalui writ saman dan pernyataan tuntutan, yang difailkan pada waktu yang sama dengan lampiran 3. Plaintif dianugerahkan satu projek ('projek') melalui surat setuju terima ('SST pertama'). Walau bagaimanapun, Ketua Setiausaha Kementerian Pengangkutan ('MOT') menghantar notis menghentikan SST pertama atas alasan kepentingan awam, keselamatan negara dan kepentingan nasional. Plaintif membantah penamatan SST pertama. Selepas itu, beberapa mesyuarat dan/atau perbincangan diadakan antara kedua-dua pihak. Ini memuncak pada perjanjian penyelesaian yang dilaksanakan antara plaintif dan defendan pertama ('D1') di mana D1 melantik semula plaintif untuk melaksanakan projek tersebut. D1 mengeluarkan SST baru kepada plaintif ('SST kedua'). Setelah menandatangani dan mengembalikan dokumen kontrak kepada MOT, plaintif meminta persetujuan defendan kedua ('D2') agar dokumen kontrak ditandatangani dalam masa terdekat. Namun, melalui siaran media, D2 mengumumkan keputusan Kabinet bahawa pelanjutan pelaksanaan projek berdasarkan perundingan langsung tidak dapat dipertahankan dan kontrak akan dibuka kembali untuk tender. Mengenai permohonan di lampiran 3, didakwa bahawa defendan sedang dalam proses membuka kembali proses pembidaan untuk projek tersebut melalui sistem tender terbuka dan akan

menghentikan atau membatalkan kontrak dengan plaintif. Oleh itu, relif injunksi interim diperlukan. Isu untuk penentuan adalah sama ada s 29 Akta Prosiding Kerajaan 1956 ('APK 1956') melarang pemberian injunksi ad interim terhadap defendan.

Diputuskan, menolak permohonan dengan kos RM10,000:

(1) Walaupun 'penuh kontroversi' seperti kes *Government of Malaysia v Lim Kit Siang and United Engineers (M) Bhd v Lim Kit Siang* [1988] 2 MLJ 12 ('kes UEM') mungkin disebabkan oleh 'penghakiman menentang yang kuat', tidak ada keputusan lain oleh mahkamah tertinggi negara ini yang memberikan penafsiran yang berbeza dengan s 29 APK 1956 dalam kes UEM. Selain itu, dengan pengisytiharan tegas dalam *Tan Bun Teet & Ors v Menteri Sains, Teknologi dan Inovasi Malaysia & Ors* [2013] 3 MLJ 676, menjadi keputusan Mahkamah Rayuan kemudian, bahawa injunksi, sama ada interim, interlokutori atau tetap boleh tidak diberikan terhadap Kerajaan di bawah s 29 APK 1956 dan s 54 Akta Relif Spesifik 1950, mahkamah ini terikat dengan doktrin stare decisis untuk juga memutuskan bahawa injunksi tidak boleh dilakukan terhadap Kerajaan atau pegawainya (lihat perenggan 46).

(2) Saman plaintif terhadap D2, pada hakikatnya, berada dalam kapasiti rasminya sebagai Menteri Pengangkutan dan anggota Kabinet. Oleh itu, injunksi ad interim tidak boleh dilakukan terhadap D2. Untuk membolehkan injunksi ad interim diberikan terhadap D2 untuk menyekat dan menghalangnya daripada membatalkan atau menghentikan SST kedua, dan dari bertindak atau mengambil langkah-langkah sehubungan dengan pembatalan atau penghentian SST kedua, pada hakikatnya, akan menahan dan mencegah Kerajaan daripada membatalkan atau menghentikan SST kedua. Ini akan bertentangan dengan s 29(2) APK 1956 (lihat perenggan 49–50).]

Cases referred to

Bina Satu Sdn Bhd v Tan Construction [1988] 1 MLJ 533 (refd)
Business Leap (M) Bhd v Pesuruhjaya Tanah Persekutuan & Ors [2018] 1 LNS 400, HC (refd)
Chin Wai Hong & Anor v Lim Guan Hoe & Anor [2014] 5 AMR 427, HC (refd)
Dalip Bhagwan Singh v Public Prosecutor [1998] 1 MLJ 1, FC (refd)
Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener) [2004] 2 MLJ 257, FC (refd)
Datuk M Kayveas v PV Das (for himself and on behalf of People's Progressive Party of Malaysia) [1997] 3 MLJ 671; [1997] 4 AMR 3912, CA (refd)
Government of Malaysia v Lim Kit Siang and United Engineers (M) Berhad v Lim Kit Siang [1988] 2 MLJ 12, SC (refd)

A *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193, CA (refd)
Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd [2003] 3 MLJ 1, CA (refd)
Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 MLJ 149, FC (refd)
Khoo Soo Teong v Khoo Siew Ghim [1991] 3 MLJ 158, SC (refd)
B *Koperasi Belia Nasional and Anor v Kerajaan Malaysia (Jabatan Kerja Raya Malaysia Cawangan Terengganu)* [2010] MLJU 1710, HC (refd)
Kwong Hing Sauce Factory v Pengarah Tanah dan Galian Wilayah Persekutuan Kuala Lumpur [2014] MLJU 566; [2014] 1 LNS 1470, HC (refd)
C *Layar Baiduri Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2020] 8 MLJ 643; [2020] 1 CLJ 884, HC (refd)
Low Geok Pau dan satu lagi lwn Goldenseal Assets Sdn Bhd dan lain-lain [2017] MLJU 927; [2017] 1 LNS 882, HC (refd)
Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641; [2008] 5 CLJ 321, FC (refd)
D *Muniandy a/l Subramaniam & Ors v Majlis Perbandaran Langkawi Bandaraya Pelancongan & Anor* [2003] 6 MLJ 177, HC (refd)
Nanthakumaran v Jaffnese Co-operative Housing Society Ltd [1980] 1 MLJ 114 (refd)
E *PWC Bina Sdn Bhd v Kerajaan Malaysia & Anor* [2016] MLJU 938; [2016] 1 LNS 1233, HC (not folld)
Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors [2005] 3 MLJ 325, CA (refd)
Saonah bte Bedul v Pentadbir Tanah dan Daerah Melaka Tengah [1994] 3 MLJ
F 758, HC (refd)
Saw Seng Kee v Director of Lands & Mines, Penang & Ors [1987] 1 MLJ 80 (refd)
Superintendent of Land and Surveys, Bahagian Mukah & Anor v Bunyak Anak Gadin & Ors [2016] MLJU 1739; [2016] 5 CLJ 558, HC (refd)
G *Superintendent of Land and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd* [2009] 5 MLJ 607, CA (refd)
Tan Bun Teet & Ors v Menteri Sains, Teknologi dan Inovasi Malaysia & Ors [2013] 3 MLJ 676; [2013] 3 CLJ 1115, CA (folld)
H *Tan Sri Dato' Tajuddin Ramli v Pengurusan Danaharta Nasional Bhd & Ors* [2002] 5 MLJ 720, HC (refd)
Tan Suan Choo v Majlis Perbandaran Pulau Pinang [1983] 1 MLJ 323 (refd)
Tengku Haji Jaafar & Anor v Government of the State of Pahang [1978] 2 MLJ 105 (refd)
I *Tidalmarine Engineering Sdn Bhd v Kerajaan Malaysia (Jabatan Kerja Raya Malaysia Cawangan Terengganu)* [2011] 2 MLJ 400, HC (refd)
Yap Piew Chuan v Araca Enterprise Sdn Bhd [1997] MLJU 249; [1998] 2 CLJ 234, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25
Government Proceedings Act 1956 s 29, 29(1)(a), (1)(b), (2)
Rules of Court 2012 O 29, O 29 r 1(2)
Specific Relief Act 1950 ss 50, 51, 52, 53, 54, 54(d), 55, Part III, Chapters IX, X

Cecil Abraham (Wilfred Abraham, Kuhendran Thanapalasingam, Shabana Farhana Amirudin and Noor Sumaeya Sofea Shamsudin with him) (Zul Rafique & Partners) for the plaintiff.
Asliza Ali (Habibah Haron with her) (Senior Federal Counsel, Attorney General's Chambers) for the defendants.

Aliza Sulaiman J:

INTRODUCTION

[1] By an ex parte notice of application ('NoA'; encl 3) dated and filed on Monday, 7 September 2020 together with the affidavit in support ('AIS') affirmed by Mohamed Razeek bin Md Hussain Maricar, the plaintiff's Group Chief Executive Officer (encls 4–7) and a certificate of urgency (encl 8), the plaintiffs sought an order to restrain and prevent the defendants from taking certain actions pursuant to O 29 of the Rules of Court 2012 ('the RoC 2012') and/or under the inherent jurisdiction of the court pending the disposal of the civil suit vide writ of summons ('writ'; encl 1) and statement of claim ('SoC'; encl 2), which were filed at the same time as encl 3.

[2] The cause papers were brought to my attention on 8 September 2020 and having read the same, I was satisfied that the case is one of urgency (see O 29 r 1(2) of the RoC). Further, in view of the fact that the first defendant ('D1') and second defendant ('D2') are the Government of Malaysia and Minister of Transport, respectively, I also exercised my discretion to direct the plaintiff to inform the defendants of the case management ('CM') for encl 3 which was initially fixed for 10 September 2020 so that the application may proceed on an 'opposed ex parte' basis (see the decision by the Court of Appeal in *Datuk M Kayveas v PV Das (for himself and on behalf of People's Progressive Party of Malaysia)* [1997] 3 MLJ 671; [1997] 4 AMR 3912 which was referred by the High Court in *Chin Wai Hong & Anor v Lim Guan Hoe & Anor* [2014] 5 AMR 427). However, the plaintiff's counsel applied for the CM date to be moved to 11 September 2020 as he had to attend a hearing in another court on 10 September 2020.

[3] On 11 September 2020, Mr T Kuhendran who appeared for the plaintiff, made an oral application for an ad interim injunction pending the full hearing of encl 3. Learned counsel contended that since D2 is named as a party

to the suit for allegedly inducing a breach of contract between the plaintiff and D1, an ad interim injunction ought to be granted at least against D2 as the plaintiff was fearful that the contract will be terminated by D1.

[4] This argument was met with strong objections by the senior federal counsel ('SFC') Habibah Haron who referred to s 29 of the Government Proceedings Act 1956 (Act 359) ('the GPA 1956') and the decisions of the Court of Appeal in *Superintendent of Land and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd* [2009] 5 MLJ 607 ('Kuching Waterfront') and *Tan Bun Teet & Ors v Menteri Sains, Teknologi dan Inovasi Malaysia & Ors* [2013] 3 MLJ 676; [2013] 3 CLJ 1115 as prohibiting the grant of any injunction against the defendants.

[5] The plaintiff's counsel retorted that he has case law to the contrary and mention was made of the decision of the High Court in *PWC Bina Sdn Bhd v Kerajaan Malaysia & Anor* [2016] MLJU 938; [2016] 1 LNS 1233.

[6] At that juncture, I was not minded to grant the ad interim injunction and the matter was set for full submissions on 18 September 2020 since the defendants were served with the cause papers on 10 September 2020 and needed time to take instructions and to make the necessary preparations. The main issue that was to be addressed is whether an ad interim injunction is to be granted until the hearing and disposal of encl 3 on an inter partes basis.

[7] Upon reading all the cause papers filed by the plaintiff, including the supplemental affidavit affirmed by the same deponent for the AIS on 15 September 2020; and written submissions by counsels representing the parties, and hearing oral submissions on 18 September 2020, I was of the view that there is no legal basis for an interim, interlocutory or perpetual injunction to be granted against the defendants. Therefore, the plaintiff's application in encl 3 was dismissed with costs of RM10,000, subject to allocatur. That quantum for costs as prayed by the SFC was agreed by the plaintiff's counsel as being a fair amount.

[8] I now set out my full grounds for the said decision hereinbelow.

SALIENT FACTS

[9] The plaintiff is a joint venture company between Dhaya Maju Infrastucture (Asia) Sdn Bhd and Lembaga Tabung Angkatan Tentera with a 80:20 shareholding structure. It was incorporated on 5 June 2017 (see the SSM search results in exh 'DM1' encl 4).

[10] By way of a *Surat Setuju Terima* dated 4 April 2018 ('first SST;' exh

'DM2' encl 4), the plaintiff was awarded the Klang Valley Double Tracking Phase Two project known as 'Projek Menaiktaraf Kemudahan Infrastruktur Landasan Keretapi Berkembar Elektrik di Lembah Klang (KVDT) Fasa 2' ('the said project'). The contract sum as stated in 'LAMPIRAN A' to the first SST is RM5,580,900,000 ('original contract sum') whilst the completion date is 3 April 2025 with a contract duration of seven years calculated from the date that the first SST comes into force.

[11] On 19 October 2018, the Secretary General of the Ministry of Transport ('MoT') sent a 'Notis Pembatalan' ('termination notice'; exh 'DM3' encl 4) pursuant to para 12(n) of the first SST which states that 'Syarikat YBhg Tan Sri adalah diingatkan bahawa Kerajaan berhak untuk membatalkan Surat ini sekiranya: ... (n) terdapat perkara yang melibatkan kepentingan awam atau keselamatan dan kepentingan negara'. Following from the termination of the first SST on the grounds of public interest, national security and national interest, which came into effect from the date that the plaintiff received the termination notice, the plaintiff was required to, inter alia, stop all works; remove its staff and workers from the site of the said project; and vacate and hand over the site to D1.

[12] The plaintiff contested the termination of the first SST. Subsequently, several meetings and/or discussions were held between the parties. The Value Engineering Lab and Value Management Lab sessions were also undertaken. These culminated in a settlement agreement being executed between the plaintiff and D1 on 19 August 2019 ('settlement agreement'; exh 'DM4' encl 4). Amongst the salient terms of the settlement agreement are that:

(a) D1 reappoints the plaintiff to implement the said project;

(b) the cost of the said project is RM4,475,250,000 ('revised contract sum');

(c) D1 releases the payments for the work done by the plaintiff under the first SST;

(d) in exchange to the above, the plaintiff will, inter alia, waive, relinquish, release and discharge all its rights for all actions, suits, claims, demands, proceedings, losses, damages, compensation, cost charges and expenses whatsoever including loss of profit and idling cost, to which D1 may be or become liable upon the issuance of the termination notice; and

(e) the settlement agreement shall be binding upon the parties and their respective successors.

[13] In accordance with cl 2 of the settlement agreement, the government issued a new *surat setuju terima* to the plaintiff on 19 August 2019 ('second SST;' exh 'DM5' encl 4) for the implementation of the said project for the

revised contract sum and the completion period being seven years from the date of possession of the site.

[14] Paragraph 2 of the second SST provides that: (a) there is a legally binding contract between D1 and the plaintiff once the latter signifies its acceptance of the second SST and all the enclosures; (b) a formal contract has to be signed on an expedited basis by including all the terms as set out in the tender documents and 'LAMPIRAN A' to the second SST; and (c) until the formal contract is signed, the second SST shall continue to be binding on D1 and the plaintiff.

[15] The formal contract documents were prepared and forwarded by MoT to the plaintiff and these were signed and returned to MoT on 23 March 2020 (exh 'DM16' encl 7).

[16] By way of a letter dated 5 April 2020, the plaintiff wrote to D2 to seek his approval for the contract documents to be signed in the immediate future.

[17] On 28 August 2020, D2, vide a media release titled 'KLANG VALLEY DOUBLE TRACKING (PHASE 2) PROJECT TO BE REOPEN FOR TENDER' together with a chronology of events (exh 'DM18' encl 7), stated that in the interest of optimising the use of public funds for large-scale infrastructure projects, the government has closely scrutinised the viability of such projects to gain the best value for the country. After considering the results of extensive study and investigation, including the Professional Review Report ('PRR') prepared by the MoT-assigned consultant, Opus Consultants in October 2018 but which was purportedly not made available to the Cabinet at that time, MoT has determined that the current cost of the said project is overpriced. It is for this reason that D2 announced the decision of the Cabinet that continuing with the implementation of the said project based on direct negotiation is untenable and the contract will be reopened for tender ('said decision').

[18] In the AIS, the plaintiff additionally exhibited a screenshot of the Facebook post by YB Anthony Loke Siew Fook, the former Minister of Transport, on 29 August 2020 (exh 'DM19' encl 7) whereby it was stated, among others, that: (a) Opus Consultants was not appointed by MoT as alleged in the media release; and (b) the PRR is not a complete official report and is merely based on information which was in the public domain.

[19] The plaintiff then wrote a seven-paged clarification to Datuk Isham Ishak, the Project Director, on 1 September 2020 (exh 'DM20' encl 7) ending with a plea to support the continuity of the said project and to provide advice and guidance to D2 on the pitfalls associated with D2's decision to retender the

said project prior to the purported said decision being finalised.

[20] As at the date of filing of the cause papers in this court, the plaintiff has not received an official letter or notice to the effect that the second SST is terminated but has decided to challenge the said decision by way of judicial review.

[21] In paras 30–33 of the AIS, it was affirmed that between November 2019 and August 2020, eight payment certificates were issued to the plaintiff for the works carried out pursuant to the second SST with a total amount payable of RM300,763,033.12 (exh 'DM21', encl 7). D1 has paid the plaintiff for payment certificate Nos 1 and 2 in the total sum of RM98,691,757.58 (exh 'DM23', encl 13), leaving the total amount of RM137,054,534.21 as due and payable for payment certificates No 3 to 6.

[22] In para 38 of the SoC, the plaintiff seeks the following reliefs:

Against the first Defendant

(a) A declaration that there exists a valid and binding contract between the plaintiff and the first Defendant by way of the Surat Setuju Terima dated 19.08.2019 ('the Contract');

(b) A declaration that any termination or cancellation of the Contract by the first Defendant will be invalid, unlawful and wrongful;

(c) The outstanding sum of RM137,054,534.21;

(d) Interest of 5% per annum on the outstanding sum in respect of each of the payment certificate from their respective due dates as set out in paragraph 36 hereinabove until the date of judgment;

(e) Interest of 5% per annum on the outstanding sum above from the date of judgment until the date of full and final settlement;

Against the second Defendant

(f) An injunction against the second Defendant to restrain and prevent the second Defendant whether by himself, his servants, employees or representatives, from continuing to abuse his public power or authority and/or from wrongfully inducing and procuring the first Defendant to be in breach of contract and/or from interfering with the Contract;

Against the first Defendant and/or second Defendant

(g) A declaration that any termination or cancellation of the Contract by the first and/or the second Defendant will be invalid, unlawful and wrongful;

(h) An injunction against the first and/or the second Defendant to restrain and prevent the first and/or the second Defendant whether

by themselves, their servants, their employees or their representatives, from cancelling or terminating the Contract;

(i) An injunction against the first and/or the second Defendant to restrain and prevent the first and/or the second Defendant whether by themselves, their servants, their employees or their representatives, from acting or taking any steps in connection with any cancellation or termination of the Contract;

(j) Damages to be assessed for the second Defendant's liability;

(k) Interests;

(l) Costs; and

(m) Such further and/or other relief that his Honourable Court deems fit and proper to grant.

[23] As for the facts giving rise to the application in encl 3, it was averred in para 34 of the AIS that the defendants are in the process of reopening the bidding process for the said project via an open tender system and will terminate or cancel the contract with the plaintiff. In para 35, an interim injunctive relief is said to be necessary because:

(a) there is a binding contract between the plaintiff and D1 by way of the settlement agreement and/or the second SST and the plaintiff is to continue with, and complete the said project;

(b) MoT has to date refused to sign and execute the formal contract documents even though the second SST states that a formal contract shall be signed by the parties on an expedited basis;

(c) D2 is well aware that the second SST shall continue to be binding on the plaintiff and D1 but threatens to wrongfully induce and procure D1 to be in breach of contract. D2's conduct amounts to unlawful interference with the second SST which will injure and cause loss to the plaintiff;

(d) D2, in announcing that the bidding process for the said project via an open tender system will be reopened, infers that D1 will not honour the settlement agreement and/or the second SST;

(e) the defendants should be estopped from not following through with their representations and/or promises as per the settlement agreement and/or the second SST;

(f) to allow the defendants to renege on their representations and/or promises would have serious and detrimental impact on the plaintiff's financial position, its ability to carry on business and its future growth and potential;

(g) there is no basis to cancel or terminate the contract with the plaintiff and to reopen the tender for the said project. The only natural and logical interference is that D2 was and is acting in bad faith and/or with an improper motive;

(h) D2's conduct is an abuse of public power or authority by a public officer who either knows that he was abusing his public power or authority, or was recklessly indifferent as to the limits to, or restraints upon, his public power or authority. D2 acted or omitted to act with either the intention of harming the plaintiff, or with the knowledge or with conscious and reckless indifference of the probability of harming the plaintiff;

(i) D2 has used his dominant position vis a vis the plaintiff and has misused his powers to act in an unjustified and improper manner;

(j) D2's acts are manifestly unfair, unreasonable and perverse and contrary to public and/or national interest which requires the said project to be completed expediently, and in breach of the terms of the settlement agreement and/or the second SST; and

(k) D2 threatens and intends to continue to abuse his public power or authority and to wrongfully induce and procure D1 to be in breach of contract and/or to interfere with the second SST.

[24] Therefore, the plaintiff's prays that:

(1) Upon the undertaking of the plaintiff to abide by any order that this Honourable Court may order on damages if this Honourable Court later finds that this order should not be granted:

1.1 The first and/or second Defendant, whether by themselves, their servants, their employees or their representatives, be restrained and prevented from cancelling or terminating the Surat Setuju Terima dated 19.08.2019 ('the Contract');

1.2 The first and/or the second Defendant, whether by themselves, their servants, their employees or their representatives, be restrained and prevented from acting or taking any steps in connection with any cancellation or termination of the Contract;

1.3 The second Defendant, whether by himself, his servants, employees or representatives, be restrained and prevented from continuing to abuse his public power or authority and/or from wrongfully inducing and procuring the first Defendant to be in breach of contract and/or to interfere with the Contract;

pending the disposal of the civil suit filed herein.

(2) That an inter partes hearing be held within 14 days from the date of the Order granting the plaintiff's application herein and/or on such date as may be provided by the Court;

(3) The costs of and occasioned by this application to be paid by the defendants; and

(4) Such further or other relief as this Honourable Court deems fit.

[25] Based on the pleadings in the SoC and the averments in the AIS, it can be surmised that, to the plaintiff, there are political undertones to the confusion, controversies and uncertainties surrounding the said project brought about by the change in the local political landscape which saw *Pakatan Harapan* coming into power after the 14th General Elections on 9 May 2018 followed by *Perikatan Nasional* in March 2020.

THE ISSUE

[26] When the case was called up for hearing on 18 September 2020, Tan Sri Dato' Cecil Abraham implored that the plaintiff was only asking for an interim injunction to be allowed until encl 3 is heard on an inter partes basis since the court has not given directions for the filing of affidavits and submissions.

[27] However, having read the cause papers and written submissions filed by learned counsels representing the parties, I was of the view that the main issue for determination involves a pure question of law as to whether s 29 of the GPA 1956 prohibits the grant of an ad interim injunction against the defendants. The learned counsels were then invited to address the court on this issue.

THE PLAINTIFF'S SUBMISSIONS

[28] The plaintiff's submissions as summarised in para 5 of its written submissions begins with the assertion that this court can grant an ad interim injunction against D1 and/or D2. It was further contended that there are serious issues to be tried as the matter involves issues as to whether:

(a) there exists a valid and binding contract between the plaintiff and D1 by way of the second SST;

(b) D2's conduct in announcing that the bidding process for the said project via an open tender system will be reopened amounts to an unlawful interference of the second SST and/or wrongful inducement and procurement of D1 to be in breach of contract; and

(c) D2's conduct amounts to an abuse of his public power or authority.

[29] The plaintiff's counsel stressed that the balance of justice lies in favour

of granting the injunction as sought vide encl 3 since a refusal to do so will cause the plaintiff to be prejudiced in a manner which cannot be compensated by way of monetary relief.

[30] For present purposes, the focus of attention is to the part of the submissions which addresses the issue of the jurisdiction of the court in the light of s 29 of the GPA 1956 and s 54 of the Specific Relief Act 1950 [Act 137] ('SRA 1950').

[31] With reference to the case of *Tan Suan Choo v Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323, the plaintiff takes the position that s 54 of the SRA 1950 applies to applications for perpetual injunctions and has no relevance to applications for a temporary injunction such as in the instant case.

[32] Any discussion on s 29 of the GPA 1956 would be incomplete if no mention is made of the landmark decision of the Supreme Court in *Government of Malaysia v Lim Kit Siang and United Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12 ('UEM's case'). For obvious reasons, the plaintiff has chosen to cite the dissenting judgment by Eusoffe Abdoolcader SCJ on the issue of the interlocutory injunction granted against UEM (see pp 48–50 and in particular at p 49 where His Lordship concluded that an injunction in that case was not precluded by the provisions of s 29 of the Government Proceedings Ordinance 1956 ('GPO 1956')).

[33] The plaintiff accepts the position that legally, this court is barred from granting a perpetual injunction against the defendants. However, it was submitted that currently, there is a divergence of views as to whether the court is similarly prohibited from granting an interim or interlocutory injunction.

[34] On one hand, the Court of Appeal in *Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 3 MLJ 325 had, at para 23 p 336, referred to the cases of *Tengku Haji Jaafar & Anor v Government of the State of Pahang* [1978] 2 MLJ 105 and *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1 as having settled the law that s 29 of the GPA does not bar the grant of an interim or interlocutory injunction against the government (see too, paras 6–9 at pp 331–332 where Gopal Sri Ram JCA recognised the different interpretations given by judges to proviso (a) to sub-s 29(1) of the GPA 1956 and provided a brief analysis of the judgments of the five judges of the Supreme Court in *UEM*'s case).

[35] It was further submitted that the Federal Court in *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641; [2008] 5 CLJ 321 had given tacit endorsement to the approach taken in *Sabil Mulia* in the following passage at pp 347–348 (with my added emphasis):

A [71] In that case the Court of Appeal held, inter alia, that the courts have jurisdiction to grant interim and permanent injunctions against any servant of the Government. It also held that it is too late in the day to argue that s 29 of the GPA bars the grant of an interlocutory or even an interim injunction against the Government. That is not the issue before us, as such I would not venture to say anything more on this save that *the courts have moved away from the traditional stand that no order of injunction may be granted against the Government*.

B

[36] On the other hand, the Court of Appeal in *Kuching Waterfront* and *Tan Bun Teet* held that s 29 of the GPA 1956 and s 54 of the SRA 1950 have the C effect of prohibiting the grant of any injunction, whether interim, interlocutory or permanent against the government.

[37] In view of the different pronouncements by the courts on this aspect of the law, Tan Sri Dato' Cecil Abraham urged this court to follow the approach D taken by Lee Swee Seng J (as His Lordship then was) in *PWC Bina* in order to achieve a just and fair solution between the parties. In that case, the court:

(a) referred to *Sabil Mulia* and *Petrojasa* and was satisfied that, although s 54(d) of the SRA 1950 provides in general that an injunction cannot be E granted to interfere with the public duties of the government, s 29 of the GPA 1956 does not prohibit the court from granting temporary or interlocutory injunctions against the government since s 54(d) of the SRA 1950 is under Chapter X, 'OF PERPETUAL INJUNCTIONS' whereas s 51 comes under Chapter IX and refers to injunctions generally;

F (b) mentioned *UEM*'s case, *Kuching Waterfront* and *Tan Bun Teet* and held that where there is a conflict of two decisions of the Court of Appeal, the High Court is at liberty to follow that which would yield a just and fair solution while awaiting the hearing of the final reliefs depending on the exigencies of each case and whether the conduct of the government has G been egregious; and

(c) allowed the application for an ad interim injunction against the Government of Malaysia to preserve the status quo pending the disposal of the application inter-parte or the hearing of the main action.

H

[38] In addition, citing the decision in *Tidalmarine Engineering Sdn Bhd v Kerajaan Malaysia (Jabatan Kerja Raya Malaysia Cawangan Terengganu)* [2011] 2 MLJ 400, the plaintiff contended that weight ought to be given to the issue of whether allowing restraining orders against the government would I interfere with the public duty or public element of a defendant's role and obligations. In the present case, the injunction sought would benefit the public because:

(a) there are frequent derailments in the KVDT 2 area due to the deteriorated condition of the track, which causes concern as regards the

safety risks to public health and life. Moreover, the said derailments have caused numerous service disruptions that cause train delays and inconvenience to the public;

(b) delaying major signal infrastructure upgrade, cess widening and slope protection works, and flood mitigation works would only cause delay and disruption to the services offered by Keretapi Tanah Melayu Bhd ('KTMB') to the public;

(c) with the completion of the said project, KTMB will be able to soon provide train services that would offer better comfort, speed, cost and safety compared to road transportation; and

(d) on the grounds of public interest, the plaintiff had, on its own accord, offered a discount of 8.12% on the original contract sum at a joint meeting negotiation attended by representatives of MoT, KTMB and the plaintiff on 17 October 2018.

Basically, the plaintiff posited that the cancellation and retendering of the said project will delay a beneficial project to the public, particularly those who rely on the KTMB network for commuting purposes.

[39] In respect of D2, the plaintiff submitted that he is sued in his personal capacity, and therefore an ad interim injunction can be granted against him. However, in the event that the court finds that D2 is sued in his official capacity, it was argued that by virtue of *Sabil Mulia*, the court can grant an ad interim injunction against him.

THE DEFENDANTS' SUBMISSIONS

[40] Apart from relying on the statutory provisions in s 29 of the GPA 1956 and s 54 of the SRA 1950, the learned SFC predictably quoted the relevant excerpts from the judgments in the *UEM*'s case, *Kuching Waterfront* and *Tan Bun Teet* as authorities for the proposition that the court cannot grant an interim injunction against the defendants.

[41] The SFC additionally cited the decisions of the High Court in *Koperasi Belia Nasional and Anor v Kerajaan Malaysia (Jabatan Kerja Raya Malaysia Cawangan Terengganu)* [2010] MLJU 1710; *Kwong Hing Sauce Factory v Pengarah Tanah dan Galian Wilayah Persekutuan Kuala Lumpur* [2014] MLJU 566; [2014] 1 LNS 1470; *Low Geok Pau dan satu lagi lwn Goldenseal Assets Sdn Bhd dan lain-lain* [2017] MLJU 927; [2017] 1 LNS 882; *Business Leap (M) Bhd v Pesuruhjaya Tanah Persekutuan & Ors* [2018] 1 LNS 400; and *Layar Baiduri Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2020] 8 MLJ 643; [2020] 1 CLJ 884 which have favoured the view as advanced by the defendants in the instant case.

[42] It was thus submitted that the plaintiff's application in encl 3 must be dismissed ab initio as the court is not seized with jurisdiction to grant the prayers as sought therein.

[43] By way of reply, the plaintiff sough to distinguish the cases relied upon by the defendants as being instances where the plaintiff was attempting to restrain the government from carrying out its public or statutory duties whereas in the present case, the duty is purely contractual.

FINDINGS OF THE COURT

[44] The powers of the court to grant injunctions is provided in s 25 of the Courts of Judicature Act 1964 (Act 91) read together with para 6 in the Schedule on '*Additional powers of the High Court*' and Part III, Chapters IX and X of the SRA 1950. The procedure relating to the granting of injunctions is found in O 29 of the RoC 2012 (see the Supreme Court decision in *Khoo Soo Teong v Khoo Siew Ghim* [1991] 3 MLJ 158).

[45] For convenience, the key provisions which are related to the issue at hand are re-produced below:

s 29 GPA 1956:

29 Nature of relief

(1) In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

Provided that —

(a) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(b) ...

(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

Sections 50, 51 and 54 SRA 1950:

PART III PREVENTIVE RELIEF CHAPTER IX

OF INJUNCTIONS GENERALLY

Preventive relief how granted

50 Preventive relief is granted at the discretion of the court by injunction, temporary or perpetual.

Temporary and perpetual injunctions

51(1) Temporary injunctions are such as are to continue until a specified time, or until the further order of the court. They may be granted at any period of a suit, and are regulated by the law relating to civil procedure.

(2) A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit;

...

CHAPTER X

OF PERPETUAL INJUNCTIONS

Injunction when refused

54. An injunction cannot be granted —

...

(d) to interfere with the public duties of any department of any Government in Malaysia,
...

...

[46] Based on my reading and understanding of the case authorities as submitted by learned counsels for the plaintiff and the defendants, my findings are as follows:

(a) the High Court in *Tan Sri Dato' Tajuddin Ramli v Pengurusan Danaharta Nasional Bhd & Ors* [2002] 5 MLJ 720 followed the decisions in *Tengku Haji Jaafar* and *Nanthakumaran v Jaffnese Co-operative Housing Society Ltd* [1980] 1 MLJ 114 where these two judgments pre-*UEM*'s case were cited as authority for the proposition that s 29 of the GPA 1956 protected the Government and its officers from injunctive orders.

However, the Court of Appeal in *Kekatong* expressed its disagreement with the reasoning of the court in *Tan Sri Dato' Tajuddin Ramli* because of the following passage at p 106 in *Tengku Haji Jaafar* which is said to have settled the law and stood unchallenged for a quarter of a century for the proposition that s 29 of the GPA 1956 prohibits permanent injunctions and not temporary injunctions:

> ... It seems to me from the foregoing that *the strict and just application of* section 29(1) of the Government Proceedings Ordinance would necessarily require, therefore, that an interlocutory injunction must lie against the Government if only to give effect to the provision that a declaratory order only may be made against the Government since without an interim injunction the Government would be free to act to effect if necessary the ultimate destruction of the subject matter of the declaration and thus render

A the purport and effect of the section nugatory and useless. It is said that no injunction at all could be issued against the Government because the section says so. But it is also said by the section that such relief may be had against the Crown as may be given as between subjects. Thus said, in my view *in order to achieve a proper balance as between the right of the individual to obtain relief* B *against the Crown and the right of the Crown to limit that relief to merely getting a declaratory order, an interim injunction becomes necessary only in order to preserve the status quo of the parties pending the declaration otherwise the whole object of the section is ab initio* defeated. (Emphasis added.)

C Abdul Razak J ultimately dismissed the application for an interim injunction to restrain the respondent from dealing with the property which was the subject of the civil suit as 'greater hardship and inconvenience would be caused to the respondent than the applicants if the injunction was issued at that stage as government endeavours D would be put to a halt in a vast territory of land where the question was yet to be determined as to whether the plaintiff would succeed at the trial or not'.

In *Nanthakumaran*, Mohamed Azmi J referred to s 29 of the GPO 1956 and s 54(d) of the SRA 1950 and concluded that the court could only E make a declaratory order but it cannot grant an injunction against the fourth defendant, the Registrar of Titles, Kuala Lumpur who is a government officer;

(b) in *UEM*'s case, Salleh Abas LP took the view, which was described as 'extreme' in *Sabil Mulia*, that since the suit against UEM is not F maintainable, there was hence no question of the then Leader of Opposition's entitlement to a remedy of declaration and injunction, permanent or otherwise and the interim injunction which was granted against UEM had no legal basis. His Lordship went on to say that:

G Apart from this, *the issue of the interim injunction against UEM is absolutely contrary to the expressed words of* s 29 of the Government Proceedings Ordinance 1956, at it has in effect indirectly restrained the Government. ...

This means that no injunction could be directly or indirectly issued against the Government or its officers. Similarly, the court has no jurisdiction to grant an H injunction against a private litigant if the injunction would have the effect of restraining the Government or its officers from performing their functions. This has been the interpretation which has been placed by the courts in England as well as in this Country.

...

I *Refusal to grant the injunction in this case is also consistent with paras. (d) and (k) of* s 54 of the Specific Relief Act ...

...

In this case since not only has the respondent no cause of action against UEM

but *the Court also has no power to issue the injunction, interim or otherwise* ... (Emphasis added.)

In his judgment, Abdul Hamid CJ emphasised that '... s 29 of the Ordinance ... affords a defence to the government or a servant of the government to a claim for an injunction subject to compliance with the requirements therein stated. The section therefore deals with rights and not procedure'. His Lordship went on to conclude that since the claim was for a declaration and injunction, it came within the definition of 'civil proceedings'

in sub-s 2(2) of the GPO 1956 and therefore, the defence under s 29 applies.

The third judge in the majority, Hashim Yeop A Sani SCJ did not deal with s 29 of the GPO 1956 at all;

(c) the Court of Appeal in *Kekatong* had additionally referred to the cases of *Tan Suan Choo*; and *Bina Satu Sdn Bhd v Tan Construction* [1988] 1 MLJ 533, which were approved by the Court of Appeal in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193, in stating that the whole of s 54 of the SRA 1950 is directed at permanent and not temporary injunctions.

On appeal, the Federal Court in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257 found it unnecessary to answer the second question of law for which leave was granted ie whether the Court of Appeal was correct in law in granting the interlocutory injunction;

(d) two of the learned Court of Appeal judges in *Kekatong* later heard the appeal in *Sabil Mulia* where the cases of *Tan Suan Choo*; *UEM*'s case; *Saonah bte Bedul v Pentadbir Tanah dan Daerah Melaka Tengah* [1994] 3 MLJ 758; and *Muniandy a/l Subramaniam & Ors v Majlis Perbandaran Langkawi Bandaraya Pelancongan & Anor* [2003] 6 MLJ 177 were referred to whilst the ones followed were *Tengku Haji Jaafar*; and *Kekatong*. The court analysed the judgments pronounced in *UEM*'s case, including the unanimous oral judgment by the earlier bench of the Supreme Court, and concluded that six out of seven judges held the view that s 29 of the GPA 1956 does not prevent an injunction being granted *against a private defendant* from entering into a transaction with the government.

The passages from *Sabil Mulia* which were cited by the plaintiff in the instant case to advance its submission are shown below:

[22] *Our attention was also drawn by learned counsel for the appellant to Saonah bte Bedul v Pentadbir Tanah dan Daerah Melaka Tengah* [1994] 3 MLJ 758 where Mohd Noor J held (obiter) that an interim injunction could be issued against the defendant Land Administrator in that case or an officer of the

Government by reason of s 29(2) of the Government Proceedings Act 1956 read together with ss 50, 51 and 54(d) of the Specific Relief Act 1950. We entirely agree with and endorse the views of the learned judge in that case. *In our judgment, the effect of current authority is that our courts have jurisdiction to grant interim and permanent injunctions against any servant of the Government.* Accordingly, there was no jurisdictional bar to the High Court granting the instant appellant the injunction it sought against the first respondent, the Director of the hospital in question. *Since a Government servant or a member of the Cabinet may be restrained by injunction, it is strictly unnecessary from a practical point of view to decide whether the Government itself may be restrained in appropriate circumstances.* Nevertheless, since the question is one which was argued before and ruled upon by the learned judicial commissioner, we think it behoves us to deal with the point. We accordingly proceed to consider the position of the second and third respondents, namely, the Ministry of Health and the Government of Malaysia.

[23] *It has been settled since at least 1978 that s 29 of the 1956 Act does not prohibit the grant of temporary injunctions against the Government. In Tengku Haji Jaafar & Anor v Government of the State of Pahang* [1978] 2 MLJ 105 *it was held that the section 'does not take away therefore the right of the court to grant an interlocutory injunction'. This court in Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1 *treated the ratio in Tengku Haji Jaafar … as settled law. Although the Federal Court reversed our decision in that case on the constitutional point, our judgment on this point was approved sub silentio. Accordingly, it is too late in the day to argue that s 29 bars the grant of an interlocutory or even an interim injunction against the Government*;

(e) even though the plaintiff argued that the Federal Court in *Petrojasa* need not refer to *Sabil Mulia* at all and by doing so, the court had accepted the view in *Sabil Mulia,* the Court of Appeal in para 18 of the judgment in *Kuching Waterfront* opined that the passage in question (as quoted in para 35 above) is obiter in nature and Arifin Zakaria FCJ's (as he then was) views were 'merely targeting the tendencies of courts in certain situations'. Indeed, His Lordship explicitly stated that the issue before the Federal Court is not the same as, or similar to, the issue before the panel of judges in *Sabil Mulia* viz 'That is not the issue before us …'.

Apart from the case of *Sabil Mulia*, no other key decisions on the issue as to whether an interim or interlocutory injunction lies against the government or its officers were analysed or discussed in *Petrojasa*. *Petrojasa* is not among the cases that were considered in *Tan Bun Teet*. In the circumstances, I am not prepared to go as far as to say that the Federal Court has endorsed the ratio in *Sabil Mulia* that s 29 of the GPA 1956 does not prohibit the grant of temporary injunctions against the government, and by doing so, has chosen to depart from the majority view in *UEM*'s case;

(f) moving on to the decision in *Kuching Waterfront*, the Court of Appeal took cognisance of *Tengku Hj Jaafar*; *Tan Suan Choo*; *Saw Seng Kee v*

Director of Lands & Mines, Penang & Ors [1987] 1 MLJ 80; *Bina Satu*; *UEM*'s case; *Petrojasa*; and *Sabil Mulia*. This is what Suriyadi JCA (as he then was), in delivering the judgment of the court, said (at pp 614, 617–618, 620 and 622–623):

> [10] The second ground is substantive in nature as it relates to the actual jurisdiction of granting the injunction. *Even though the High Court has the discretion to grant it,* s 29 of the GPA *does not permit the granting of any injunction against the government, and likewise* s 54 of the Specific Relief Act *has the same bar for any department of any Government in Malaysia. …*
>
> …
>
> [19] Needless to say *the words of* s 29(1)(a) of the GPA *are quite clear and there is no reason to depart or whittle away what has been built into it. In Lim Kit Siang v. United Engineers (M) Bhd & Ors … the Supreme Court affirmed the view of the High Court judge as regards the express prohibition in s 29, though not the extension of its scope*. It was unable though to agree that the provision prevents the granting of an injunction against a party (UEM there) having a transaction with the government.
>
> …
>
> [29] To wind up all the above prohibitive provisions, the rationale of allowing the government, any government department or government servants to carry out its duties to the public, and without fear of any unnecessary impediment, must be one of the many obvious reasons why the GPA and the SRA have been so legislated in that manner.
>
> …
>
> [35] As we were satisfied that:
>
> (g) the combined effect of the hurdle of s 29(1)(a) of the GPA, in that no injunction may be ordered against the government, and the preclusion of s 29(1)(b) of the GPA whereby courts cannot order the recovery of the land from the government or the delivery of property to the respondent had not been overcome; or
>
> (h) the balance of convenience founded on public interest or sufficiency of damages favoured the non-issuance of an injunction, regardless of the above statutory inhibitions,
>
> we accordingly meted down the consequential orders.
>
> … we thereupon ordered that the interim injunction be set aside, … (Emphasis added.)

Mohamad Ariff Md Yusof J (as he then was) in *Koperasi Belia Nasional* professed to finding it difficult to reconcile the decision in *Kuching Waterfront* with that in *Sabil Mulia*, nevertheless His Lordship concluded that he was bound by the 'very wide holding' of the Court of Appeal in the later decision in *Kuching Waterfront*.

(a) the expansive scope of the judgment in *Kuching Waterfront* on the current issue that is being examined is further strengthened by another decision of the Court of Appeal. In *Tan Bun Teet*, the court followed *UEM*'s case and referred to *Kuching Waterfront*. Azhar Mohamed JCA (now CJM) at pp 1128–1129 wrote:

> [14] ... *An injunction, interim/interlocutory or permanent, cannot be granted against the government under* s 29 of the GPA *and under* s 54 of the SPA. *The authority to support this proposition can be found in the decision of our then Supreme Court in Lim Kit Siang v United Engineers (M) Bhd & Ors* ...
>
> *[15] The principle of law enunciated above has been reaffirmed by the Court of Appeal in ... Kuching Waterfront ...*
>
> [16] It follows from this, ..., if the relief sought is granted, this will interfere with the public duty of the second respondent under the AELA and as such, s 29 of the GPA protects the second respondent, being a public authority, from any form of injunctive orders. (Emphasis added.)

Thus, it appears that notwithstanding the comment by the court in *Sabil Mulia* that the acceptance of Salleh Abas LP's view in *UEM*'s case by the High Court in *Muniandy a/l Subramaniam*; at pp 183–184 was done 'without any proper appreciation or evaluation of the jurisprudential worth of that view', the court in *Kuching Waterfront* and *Tan Bun Teet* have cited *UEM*'s case as authority to support the finding that s 29 of the GPA 1956 prohibits the granting of all types of injunction, whether temporary or perpetual, against the government;

(b) the appeal by the Superintendent of Land and Surveys Bahagian Mukah and the State of Government of Sarawak in *Superintendent of Land and Surveys, Bahagian Mukah & Anor v Bunyak Anak Gadin & Ors* [2016] MLJU 1739; [2016] 5 CLJ 558 was against the order of the learned judicial commissioner in granting the prohibitory injunction and mandatory injunction as prayed by the plaintiffs who were of Iban race and had commenced a representative action claiming trespass on their native customary rights located within an area of land under a provisional lease. The Court of Appeal agreed with the submission by the state legal officer that s 29 of the GPA 1956 does not permit the granting of any injunction against the government and that under s 54(d) of the SRA 1950, no injunction could be granted which would interfere with the public duties of a government department. In terms of the analysis of cases on s 29 of the GPA 1956 and SRA 1950, only an excerpt from the judgment in *Kuching Waterfront* was quoted by the court, being one of two cases, which is listed in the law report;

(c) the reasoning that the court is not prohibited from granting temporary or interlocutory injunctions against the government on the basis that s 51 of the SRA 1950 draws a distinction between temporary injunctions and

perpetual injunctions, and the placement of s 54(d) under Chapter X of SRA 1950 which deals with perpetual injunctions is found in *Tan Suan Choo* (at p 324; and it may be added that by referring to *Tan Suan Choo* at p 25, the Court of Appeal in *Kekatong* has given tacit approval to this approach); the dissenting judgment of Abdoolcader SCJ in *UEM*'s case (at p 50); the judgment of Mohd Noor J in *Saonah* (at p 764); and in *PWC Bina* (it is additionally observed that in *Bina Satu*, the High Court held that ss 52 to 55 of the SRA 1950 must be read to have reference to perpetual injunctions only as they are placed in the 10th Chapter of the Act entitled 'Perpetual Injunctions'); and

(d) in *PWC Bina*, the High Court alluded to the approach taken by the High Court in *Yap Piew Chuan v Araca Enterprise Sdn Bhd* [1997] MLJU 249; [1998] 2 CLJ 234 in the situation where there is a conflict of two decisions of the Court of Appeal, namely that the High Court is free to follow either one (see too, the discussion by the apex court in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 on, among others, the doctrine of stare decisis; the exceptions affecting especially the Court of Appeal; and the statement that 'When two decisions of the Federal Court conflict on a point of law, the later decision therefore ... prevails over the earlier decision'. at pp 12–14).

With due respect, I am not persuaded to take the same course as the court in *PWC Bina* in view of the fact that, after the judgment of the majority in *UEM*'s case, the then Supreme Court and later, the Federal Court, have not specifically departed from the said judgment. As 'highly controversial' as *UEM*'s case may be due to the 'vigorous dissenting judgments' which supposedly reflects the correct proposition of the law as contended by the plaintiff's counsel, there is no other decision by the highest court of this country which have given a different interpretation to s 29 of the GPA 1956 than that in *UEM*'s case. Besides, with the firm pronouncement in *Tan Bun Teet*, being a later decision of the Court of Appeal, that an injunction, whether interim, interlocutory or permanent, cannot be granted against the government under s 29 of the GPA 1956 and s 54 of the SRA 1950, this court is bound by the doctrine of stare decisis (see paras 49–54 in the judgment of the Federal Court in *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149 at pp 170–172) to similarly hold that an injunction cannot lie against the government or its officer (see also the views expressed by Wan Ahmad Farid Wan Salleh JC (as His Lordship then was) in paras 21–22 in *Business Leap*).

[47] I now turn to the plaintiff's claim against D2. Firstly, it is observed that D2 is not named according to the designation 'Minister of Transport' but by his name and NRIC number. In para 3 of the SoC, D2 is described as the 'current Minister of Transport' with an address for service at the office of MoT.

The material pleadings in the SoC which pertain to D2 is summarised below:

(a) sub-paras 18(d) and (e) — that the plaintiff sent the letter dated 5 April 2020 to D2 to request that the contract documents be executed for the said project in accordance with the second SST;

(b) para 19 — that the plaintiff discovered the real reason for the non-execution of the contract documents ie D2 had the ill intention and/or improper motive to terminate or cancel the contract with the plaintiff;

(c) paras 20 to 23 — states the facts surrounding the press release by D2 on 28 August 2020 and the posting by D2's predecessor in his official Facebook page; and

(d) paras 24, 28, 29, 30 and 31 — the allegations against D2, namely that: (i) D2 denied the opportunity for the plaintiff to be heard to defend the second SST and the revised contract sum as D2 was motivated and/or prompted with improper motive and/or in bad faith to injure the plaintiff; (ii) D2, as the Minister in charge of transportation in the country, had abused his powers and used his dominant position vis a vis the plaintiff to act in an unjustified and improper manner; (iii) D2's acts are manifestly unfair, unreasonable, perverse and contrary to the public and/or national interest; (iv) D2's acts are in breach of the settlement agreement and/or the second SST; (v) D2 is liable for the tort of misfeasance in public office; and (vi) D2's conduct amounts to unlawful interference with the second SST which will injure and cause loss to the plaintiff.

[48] By virtue of paras 26–27 in the SoC, the plaintiff contends that the defendants should be estopped from reneging on the promises and/or representation as per the settlement agreement and/or the second SST; and that D2 ought to be restrained from, among others, continuing to abuse his public power or authority.

[49] Although the plaintiff submitted that D2 is sued in his personal capacity, having scrutinised the pleadings in the SoC and the affirmations in the AIS, in my opinion the plaintiff's suit against D2 is, in substance, in his official capacity as the Minister of Transport and a member of the Cabinet. Even the Attorney General's Chambers has accepted this to be the case as shown by SFC Habibah Haron's attendance in court on 11 September 2020 to appear for not only D1, but D2 as well. Therefore, an ad interim injunction does not lie against D2 for the same reasons as explicated earlier.

[50] Moreover, to allow an ad interim injunction to be granted against D2 to restrain and prevent him from cancelling or terminating the second SST, and from acting or taking any steps in connection with any cancellation or

termination of the second SST would, in effect, restrain and prevent the government from cancelling or terminating the second SST. This would contravene sub-s 29(2) GPA 1956.

CONCLUSION

[51] Based on the aforesaid considerations, this court is bound by the decision of the apex court in *UEM*'s case that no injunction can be directly or indirectly issued against the government or its officers. In so far as the decisions by the Court of Appeal is concerned, this court would opt to follow the clear pronouncement in the later decision in *Tan Bun Teet* that an interim, interlocutory or permanent injunction cannot be granted against the government under s 29 of the GPA 1956 and s 54 of the SRA 1950.

[52] Even though the court appreciates the predicament and gravity of the situation faced by the plaintiff in the present circumstances, the court is constrained to not only dismiss the application for an ad interim injunction but also encl 3 in limine as this court is satisfied that, as a matter of law, the prayers as sought by the plaintiff cannot be granted.

[53] Directions were given for the filing of the defence and reply to defence and a date for CM was duly fixed.

Application dismissed with costs of RM10,000.

Reported by Ahmad Ismail Illman Mohd Razali